



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)**

**Appeal No. UA-2022-000010-T
[2022] UKUT 202 (AAC)**

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the West Midlands Traffic Area

Before: M Hemingway: Judge of the Upper Tribunal
K Pepperell: Member of the Upper Tribunal
M Smith: Member of the Upper Tribunal

Appellant: HRA Builders Merchants Ltd.

Reference No: OD2048111

Heard at: Birmingham Civil Justice Centre

Date of Hearing: 24 June 2022

Date of Decision: 25 July 2022

DECISION OF THE UPPER TRIBUNAL

This appeal is allowed. The decision of the Traffic Commissioner of 9 December 2021 is set aside. The case is remitted for re-determination by a Traffic Commissioner other than Commissioner N Denton.

Subject matter:

Fairness/ natural justice

Cases referred to:

Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695

REASONS FOR DECISION

1. This is an appeal to the Upper Tribunal brought by HRA Builders Merchants Ltd (“HRA”) from a decision of a Traffic Commissioner (“TC”) made on 9 December 2021 to revoke its standard national goods vehicle operator’s licence (reference OD2048111) and to disqualify the company itself and its two directors Ansar Ali and Saika Bibi from holding or obtaining any type of operator’s licence in any traffic area and, in the case of the directors, from being directors of any company holding or obtaining such a licence.

2. The appeal was listed for a traditional face-to-face hearing which took place before us, at Birmingham, on 24 June 2022. One of the directors, Mr Ansar Ali, was in attendance. The other was not. HRA and the directors were not legally represented. After the hearing we reserved our judgment. We subsequently concluded that the appeal ought to be allowed and what follows amounts to an explanation as to why we have so concluded.

3. Ansar Ali and Saika Bibi are brother and sister. Their parents are Zaman Ali and Arshad Begum. HRA had previously sought a restricted licence. That application was considered at a Public Inquiry (“PI”) which took place on 5 August 2021. At the time that PI was held, Zaman Ali and Arshad Begum were directors of HRA alongside Ansar Ali and Saika Bibi. The application was refused and the Deputy Traffic Commissioner (“DTC”) who refused the application following the PI, was strongly critical of Zaman Ali and Arshad Begum with respect to the way in which they had conducted a previous licence held by them as a partnership. There had, it was said, been “*numerous and serious shortcomings in compliance*”. But although the DTC refused that application, he made it clear that he could envisage the granting of a standard national licence in the future if certain conditions were met including the resignation of Zaman Ali and Arshad Begum as directors and the use of one Thomas Reddy as transport consultant, for at least the first few months of any such licence.

4. On 17 August 2021, HRA made an application for a standard national goods vehicle operator’s licence, seeking authority for the use of 4 vehicles. In the application it was indicated that the only directors were Ansar Ali and Saika Bibi. The nominated transport manager was one Magdalena Talty. Undertakings were given to the effect that Zaman Ali and Arshad Begum would have no involvement with the business at all except as shareholders and that Thomas Reddy would be utilised as a transport consultant for the first 3 months from the granting of the licence in order to assist in ensuring compliance with regulatory requirements. On 18th September 2021, the licence was granted.

5. Difficulties of significance arose very shortly afterwards. On an unspecified date but which was said to be “*very shortly after*” the granting of the licence, the Office of the Traffic Commissioner (“OTC”) received information suggesting that HRA had been operating vehicles prior to the granting of the licence. In other words, it had, it was suggested, been operating vehicles unlawfully. The OTC wrote to HRA on 23 September 2021 asking it to provide tachograph reports from the units of its relevant vehicles, but the requested reports were not provided. On 30 September 2021 the OTC received a letter from Thomas Reddy informing it that his services as a transport consultant had not been taken up by HRA and that was possibly because it was unwilling to meet his fees. On 6th October 2021 the OTC received a letter from Magdalena Talty indicating that she was resigning as HRA’s transport manager with immediate effect. It is clear from the content of the letters sent by Mr Reddy and Ms Talty that both had found assurances given to them on behalf of HRA to the effect that it had not been operating vehicles prior to the grant of its licence, unconvincing. On 15

October 2021 the OTC received emails from Zaman Ali the content of which appeared to give the impression he had involvement with the licence which went beyond his being a mere shareholder.

6. Unsurprisingly in light of all the above, HRA was called to a PI. On 4 November 2021 a letter was sent to the directors of HRA (Ansar Ali and Saika Bibi) informing them that the PI was scheduled to take place on 9 December 2021.

7. Ansar Ali says that he had, prior to receiving notification of the date of the PI, booked flight tickets to Pakistan. His scheduled departure date was 4 December 2021 and his scheduled return date was 17 December 2021. It is also his case that Saiki Bibi was booked on the same flight. Ansar Ali says he sent an email to the OTC on 26 November 2021 indicating that he was going to be out of the country for the above 2-week period. Indeed, the OTC has subsequently accepted that it accidentally deleted an email which had been sent by Ansar Ali on that date. The Upper Tribunal accepts, of course, that errors of that sort will inevitably occur in a busy office and acknowledges that the OTC has been very helpful in bringing this, quite properly, to the Upper Tribunal's attention.

8. It appears that the email which was deleted was very likely to have been the one which Ansar Ali says contained his request for a postponement. But, in the circumstances, it was not brought to the attention of the TC prior to the hearing or on the day. The TC, accordingly, went ahead with the PI having formed the view that the failure to attend on the part of each director was entirely unexplained. It was in those circumstances and on the basis of that understanding, that he took the above decisions. His written reasons are dated 9 December 2021 and, essentially, he relied upon what he found to be misconduct on the part of HRA in operating vehicles prior to the grant of its licence; its failure to fulfil its undertaking that it would employ Thomas Reddy as transport consultant for at least the first 3 months of the license periods; its failure to fulfil its undertaking that Zaman Ali would have no involvement of the business other than that of a shareholder; and what the TC found to be a consequent loss of repute on the part of HRA.

9. HRA, principally through Ansar Ali, appealed to the Upper Tribunal. The brief grounds of appeal amounted to an assertion that the TC had been informed that both of the directors were abroad at the time the PI took place and were, therefore, unable to attend it.

10. At the oral hearing of the appeal Ansar Ali, on behalf of HRA, told us that he and Saika Bibi had travelled to Pakistan to attend their sister's wedding which they had regarded as a very important event. He had sent an email asking that the PI be listed on an alternative date after his return. He acknowledged he had not said very much in the email in support of his application, but he told us he is not the sort of person who tends to write a lot. The wedding date had been fixed approximately a year prior to the date of it taking place and, accordingly, the travel tickets had been booked some time ago. He accepted that he and Saika Bibi had made "*a lot of mistakes*" whilst running the company but thought they would do better in the future. He indicated he would welcome the opportunity to attend a PI if the Upper Tribunal felt able to set aside the TC's decision and remit.

11. An appellant has a right of appeal to the Upper Tribunal against decisions taken by a TC or taken on behalf of a TC as specified in section 37 of the Goods Vehicles (Licensing of Operators) Act 1995. The decisions which are under challenge in this appeal are all decision which attract a right of appeal.

12. Paragraph 17 of the Transport Act 1985 provides that the Upper Tribunal is to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purpose of the exercise of its functions under an enactment relating to transport. But in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695, it was explained by the Court of Appeal that the Upper Tribunal will decide such matters without the benefit of seeing and hearing from witnesses and on the basis of the material which was before the TC. It was further explained that the burden lies on an appellant to show, in order to succeed on appeal, that the process of reasoning and the application of the relevant law requires the Upper Tribunal to adopt a different view to that taken by the TC. Where the Upper Tribunal does find a basis to interfere with the TC's decision it has the power to make such order as it thinks fit or to remit the matter to the TC for re-hearing and determination. But it may not, on any appeal before it, take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal.

13. The concern here is one of procedural fairness. Due to an administrative error, the TC was unaware that Anwar Ali and Saika Bibi were in Pakistan at the date of the PI and was unaware that an attempt had been made to have the PI postponed. In such circumstances, where a TC proceeds (through no fault of his or her fault of her own) in ignorance of a postponement request, there may be a powerful case for saying that matters ought to be rectified by affording a fresh opportunity at a fresh PI. In this case, we have hesitated before deciding that the TC'S decision ought to be set aside. We have, first of all, asked ourselves whether it can be said that even if the postponement request had been placed before the TC it is inevitable that it would have been refused. If that was so, then the procedural irregularity which has occurred would not be material.

14. The email, which we accept was sent (we have seen a copy of what was said to have been sent) does not, even on Anwar Ali's own acknowledgement, contain very much in the way of useful information. Essentially, all that is said, is that the two directors will be out of the country due to a pre-arranged trip to Pakistan. We were told, at the hearing, that the flight tickets had been booked prior to the listing of the PI, that the purpose of the trip was to attend the wedding of a close family member (and we accept that such an event would have strong cultural significance), and that there was nevertheless a willingness on the part of Anwar Ali to attend a PI as soon as possible after his return.

15. Whilst it is possible that the paucity of the information supplied to the OTC might not have been sufficient to persuade the TC to postpone, we do not feel we can be sure of that. Further, it might have been the case that the TC, if he had received the brief email sent by Anwar Ali, would have sought, and subsequently obtained the sort of further information which we were able to elicit at the hearing. That being so, we are not able to say that a postponement would inevitably have been refused. We cannot on that basis say that the procedural irregularity can be characterised as necessarily immaterial.

16. We have asked ourselves whether the respective cases of HRA, Anwar Ali, and Saika Bibi, are so weak that the outcome would be inevitable even had there been a PI. If that were the case, then that would be another basis upon which it might be concluded that the procedural irregularity was not material. Again, this is a matter about which we have hesitated. On the face of it, more than one undertaking has been broken and there is reason to think (or at least Mr Reddy and Ms Talty thought so) that vehicles may have been used unlawfully prior to the granting of the licence which the TC revoked. But we have decided we

cannot go so far as to say that had there been a PI and had the TC heard from Anwar Ali and possibly Saika Bibi, he would inevitably have decided to revoke and/or would inevitably have decided to disqualify HRA and each director indefinitely. So, again, we are not able to say that, on this basis, the procedural irregularity was necessarily immaterial.

17. In light of the above we have concluded, notwithstanding that HRA and its two directors might possibly have an uphill struggle, that the proper, appropriate and fair course of action is to set aside the TC's decisions. We do so and we remit to a different TC for a reconsideration which should be conducted (unless it is subsequently said by or on behalf of HRA's directors that one is not wanted) by way of a PI.

18. This appeal to the Upper Tribunal, then, is allowed on the basis until the extent explained above.

M Hemmingway
Judge of the Upper Tribunal

K Pepperell
Member of the Upper Tribunal

M Smith
Member of the Upper Tribunal

Authorised for issue on 25 July 2022